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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/664,101

09/17/2003

Beata Bartkowska

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01/09/2008

UNILEVER INTELLECTUAL PROPERTY GROUP

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/09/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/664,101

Applicant(s)

BARTKOWSKA ET AL.

Examiner

Kelly Mahafkey

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 November 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5 and 20-22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 20-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION**

Amendments made 11/29/07 have been entered.  
Claims 1-5 and 20-22 are pending.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on November 29, 2007 has been entered.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The previous 103(a) rejection of claims 1-5 over Jonas (US 4971824) in view of the combination of Koss (WO 02/094035) and Blake (US 4244981) has been withdrawn in light of applicant's amendments made November 29, 2007.

Claims 1-5 and 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brake (US 6432466) in view of Jonas (US 4971824).

Brake teaches of a frozen product comprising about 3-32% sweetener (HFCS and sucrose), about 0.2-1.5% stabilizer, about 0-0.12% emulsifier, 0-10% non-fat milk solids, 0-5% milk fat, water, and 20-90% fruit puree, which inherently contain soluble and insoluble dietary fiber (Abstract). Brake teaches that the composition does not include additional emulsifiers by teaching that the composition includes 0% emulsifiers. Brake teaches that the composition is aerated by teaching that the mixture is homogenized (Column 2 lines 8-11). Brake, however, is silent to the overrun of the aerated product as recited in claim 1, to the pH of the product when melted as recited in claim 1, to the specific amount of soluble and non soluble dietary fiber in the product as recited in claims 1, 4, and 5, to the composition as containing no additional stabilizers

as recited in claim 1, to the meltdown initiation time of the product as recited in claims 1 and 21, and to the process of making the product as including forming a premix of pasteurized milk solid protein and fruit puree, wherein the pH of the puree is adjusted above the value above the isoelectric point of the milk protein as recited in claim 22.

Jones teaches of a frozen dessert comprising fruit puree. Jones teaches that pH must be adjusted within the appropriate range. Jones teaches that a pH which is too high results in an unset food which remains liquid after processing; and pH which is too high results in a product which can separate. Jones teaches that the pH is less than about 4.5. Refer specifically to Column 2 lines 47-68. Jones teaches of an overrun 18-100 (Column 2 lines 47-53) and that the overrun is adjusted depending on the desired form and hardness of the final product (Column 3 lines 12-28).

Regarding the overrun of the aerated product, it would have been obvious to one of ordinary skill in the art at the time the invention was made to aerate the frozen product to a specific amount depending on the final form and hardness of the final product. To do so would be within the ordinary skill and ingenuity of one of ordinary skill in the art and would not impart a patentable distinction to the claims.

Regarding the pH of the product when melted, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the pH of the frozen composition to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught by Jones.

Regarding the specific amount of soluble and non soluble dietary fiber in the product, Brake teaches that the composition contains 20-90% fruit puree, applicant teaches that the claimed dietary fiber is derived from about 1-55% fruit puree, thus one of ordinary skill in the art at the time the invention was made would expect the composition as taught by Brake to contain the instantly claimed amount of fiber absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the composition as containing no additional stabilizers, Brake teaches of adding about 0.2% stabilizers. It would have been obvious to one of ordinary skill in the art at the time the invention was made to not include additional stabilizers if the

stabilizers were inherently included in the other compositional ingredients and/or in order to form a composition without additives.

Regarding the meltdown initiation time of the product Brake discloses of a frozen composition with substantially the same composition as that as instantly claimed, thus one of ordinary skill in the art at the time the invention was made would expect the frozen composition as taught by Brake to possess substantially the same properties as the instantly claimed invention, including meltdown initiation time properties.

Regarding the process of making the product as including forming a premix of pasteurized milk solid protein and fruit puree, wherein the pH of the puree is adjusted above the value above the isoelectric point of the milk protein as recited in claim 22, Applicant is reminded that a recitation of the method of making the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. Thus, the claimed invention would have been obvious, as Blake in view of Jones teach of substantially the same composition with the same pH as instantly claimed, absent any clear and convincing evidence and/or arguments to the contrary.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-5 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Application/Control Number:  
10/664,101  
Art Unit: 1794

Page 5

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/  
Primary Examiner  
Group 1700

Kelly Mahafkey  
Examiner  
Art Unit 1794

A handwritten signature in black ink, appearing to be 'KM', with a long, sweeping horizontal stroke extending to the right.